(4) (3)

Nos. 92-155 and 92-219

FILED
OCT 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR.,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

MOTION OF APPELLEE LIEUTENANT GOVERNOR NICK THEODORE TO DISMISS OR AFFIRM

JOHN C. MOYLAN, III
(Counsel of Record)
OFFICE OF THE LIEUTENANT GOVERNOR
P.O. Box 142
Columbia, SC 29202
(803) 734-2080

TERRELL L. GLENN
BLANEY A. COSKREY, III
GLENN, IRVIN, MURPHY GRAY & STEPP
1510 Calhoun Street
P.O. Box 1550
Columbia, SC 29202
(803) 765-1100

WILLIAM R. STEIN
MARK H. DUESENBERG
HUGHES HUBBARD & REED
1300 I Street, N.W.
Suite 900 West
Washington, D.C. 20005
(202) 408-3600
Attorneys for Lieutenant Governor Nick Theodore

October 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Is this appeal from the three-judge district court's order fashioning interim redistricting plans moot when the election for which the plans were fashioned has taken place and the state legislature has an opportunity to enact its own plans in the two to four years before the next elections take place?

2. Should this Court summarily affirm the district court's interim redistricting plans for a state legislature when (a) the plans previously in effect were approved by the Justice Department and the courts as consistent with the Voting Rights Act and (b) although the black percentage of the state's population has declined since the previous plans were approved, the district court's plans enhance the opportunity for black citizens to participate in the political process and elect representatives of their choice by increasing the number of black majority districts as well as the concentration of black citizens within many of those districts?

3. Did the district court abuse its discretion in formulating, in time for impending elections, interim redistricting plans for a state legislature that (a) contain only *de minimis* variation from population equality, (b) do not diminish, and in fact enhance, minority voting opportunity from the plans previously in effect, (c) apply the substantive standards of both Sections 2 and 5 of the Voting Rights Act, and (d) honor well-established state policies of respecting county lines and political subdivisions, preserving communities of interest through geographical compactness and contiguity, and maintaining constituent-representative relations?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Legislative Districts Existing In 1990	2
C. The Redistricting Process After The 1990 Census	4
D. Proceedings In The District Court	5
E. The District Court's Analysis	7
F. The District Court's Interim Plans	9
ARGUMENT	12
I. THE APPEALS SHOULD BE DISMISSED AS MOOT BECAUSE THE ELECTION WILL HAVE TAKEN PLACE BEFORE THIS COURT CAN REVIEW THE CASE	12
II. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE APPEAL PRESENTS NO SUBSTANTIAL ISSUES	14
III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT APPLIED WELL-ESTABLISHED LEGAL CRITERIA AND DID NOT ABUSE ITS DISCRETION IN FORMULATING INTERIM REDISTRICTING PLANS	17
A. The District Court's Interim Redistricting Plans Are Consistent With Well-Established Legal Criteria	18
B. The District Court Properly Applied Section 2 In Fashioning Its Interim Plans	22
CONCLUSION	30

TABLE OF AUTHORITIES

CASES Page

Beer v. United States, 425 U.S. 130 (1976) .....*passim*
Chapman v. Meier, 420 U.S. 1 (1975) 14, 18, 20
Chisom v. Roemer, 111 S. Ct. 2354 (1991) 27
City of Lockhart v. United States, 460 U.S. 125 (1983) .....*passim*
Connor v. Finch, 431 U.S. 407 (1977) .....*passim*
DeFunis v. Odegaard, 416 U.S. 312 (1974) 13, 14
East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) 18
Ely v. Klahr, 403 U.S. 108 (1971) 18
Emison v. Growe, 782 F. Supp. 427 (D. Minn.), *prob. juris. noted*, 112 S. Ct. 1557 (1992) 29
Ewing v. Monroe County, 740 F. Supp. 417 (N.D. Miss. 1990) 29
Graham v. South Carolina, Civ. No. 3:84-1430-15 (D.S.C. July 31, 1984), *appeal dismissed for lack of jurisdiction sub nom., NAACP v. Daniel*, 469 U.S. 1101 (1985) 3, 16
Harris v. City of Birmingham, 112 S.Ct. 2986 (1992) (mem.), *vacating as moot, Greene County Racing Commission v. City of Birmingham*, 772 F. Supp. 1207 (1991) 13
Hecht Co. v. Bowles, 321 U.S. 321 (1944) 18
Illinois State Board of Elections v. Socialist Workers, 440 U.S. 173 (1979) 13
James v. City of Sarasota, 611 F. Supp. 25 (M.D. Fla. 1985) 29
Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss.), *aff'd mem. sub nom., Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984) 28, 29
Karcher v. Daggett, 462 U.S. 725 (1983) 19, 20
Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) 29
Kirkpatrick v. Preisley, 394 U.S. 526 (1969) 8
Mellow v. Mitchell, No. J-57-1992 (Pa. Mar. 26, 1992), *petition for cert. filed*, 60 U.S.L.W. 3881 (June 8, 1992) (No. 91-2015) 29
McDaniel v. Sanchez, 452 U.S. 130 (1981) .....*passim*

TABLE OF AUTHORITIES—Continued

Page

Meyer v. Grant, 486 U.S. 414 (1988) 13
Mississippi v. United States, 490 F. Supp. 569 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980) 27
Mobile v. Bolden, 446 U.S. 55 (1980) 27
NAACP v. South Carolina, Civ. No. 3:84-2865-8 (D.S.C. May 29, 1986) 3
NAACP v. South Carolina Democratic Party, Civ. No. 3:88-2492-2 (D.S.C. Feb. 29, 1989), *aff'd mem.*, 898 F.2d 146 (4th Cir. 1990) 3
Neal v. Coleburn, 689 F. Supp. 1426 (E.D. Va. 1988) 29
Perkins v. Matthews, 400 U.S. 379 (1971) 15, 27
Roman v. Sincock, 377 U.S. 695 (1964) 22
Seastrunk v. Burns, 772 F.2d 143 (5th Cir. 1985) 17
South Carolina State Conf. of Branches of NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982) 3
South Carolina v. United States, 589 F. Supp. 757 (D.D.C. 1984) 3
Swann v. Adams, 385 U.S. 440 (1967) 20
Terrazas v. Slagle, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd mem. sub nom., Richards v. Terrazas*, 112 S. Ct. 3019 (1992) 27
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991), *aff'd mem.*, 112 S. Ct. 2296 (1992) 27
United Jewish Organization of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 28
Upham v. Seamon, 456 U.S. 37 (1982) ..... *passim*
Watkins v. Mabus, 112 S. Ct. 412 (1991) (mem.), *aff'g in part, vacating as moot in part*, 771 F. Supp. 789 (S.D. Miss.) 13, 27, 28
Whitcomb v. Chavis, 403 U.S. 124 (1970) 19
White v. Regester, 412 U.S. 755 (1973) 27
White v. Weiser, 412 U.S. 783 (1973) ..... *passim*
Wise v. Lipscomb, 437 U.S. 535 (1978) ..... *passim*

TABLE OF AUTHORITIES—Continued

CONSTITUTION AND STATUTES Page

S.C. Const. art. III, §§ 2, 3, 6 2
28 U.S.C. § 2284 (1988) 5
42 U.S.C. § 1973 (1988) ..... *passim*
42 U.S.C. § 1973c (1988) ..... *passim*

ADMINISTRATIVE REGULATIONS

28 C.F.R. Part 51 (1991) 8
28 C.F.R. § 51.54(b) (1) (1991) 15
28 C.F.R. § 51.55(b) (2) (1991) 25

MISCELLANEOUS

S. Rep. No. 94-295, 94th Cong., 1st Sess. 1 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774 19
S. Rep. No. 97-417, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 25
Office of the Clerk, South Carolina House of Representatives, *Blacks Offering for Election to the General Assembly* (1992-1993) 15
Office of the Clerk, South Carolina House of Representatives, *Legislative Black Caucus* (Feb. 1, 1992) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 92-155 and 92-219

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,

Appellants,

v.

NICK THEODORE, *et al.*,

Appellees.

CARROLL A. CAMPBELL, JR.,

Appellant,

v.

NICK THEODORE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of South Carolina

---

MOTION OF APPELLEE LIEUTENANT GOVERNOR NICK THEODORE TO DISMISS OR AFFIRM

Appellee Nick Theodore, Lieutenant Governor of the State of South Carolina ("Lieutenant Governor"), submits this motion to dismiss the above-captioned appeals or, in the alternative, to affirm summarily the judgment of the court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are included in the appendices to the jurisdictional statements filed by the Statewide Reapportionment Advisory Com-

mittee ("SRAC") and by Carroll Campbell, the Governor of South Carolina ("Governor"). (The appendix to SRAC's Jurisdictional Statement is referred to herein as "App.")

STATEMENT OF THE CASE

A. *Introduction*

These cases are appeals from the order of a three-judge district court implementing judicially-fashioned, interim redistricting plans for the South Carolina General Assembly. The 1990 census revealed that South Carolina's existing legislative districts no longer were constitutionally permissible under the "one-person, one-vote" principle. The General Assembly embarked on the task of redistricting, but the political process became deadlocked. The three-judge district court concluded that, as a result of the legislative impasse, "no plans could be enacted and properly precleared through the United States Department of Justice in time to hold regularly scheduled elections." App. 14. In order to assure that constitutional elections can be held in 1992—when the entire General Assembly is up for re-election—the three-judge court, rejecting the various plans proposed by the parties, formulated and imposed its own redistricting plans "as an interim remedy." App. 12.

B. *The Legislative Districts Existing In 1990*

The South Carolina General Assembly is divided into a 46-member Senate and a 124-member House of Representatives ("House"). Senators are elected to four-year terms and House members are elected to two-year terms. S.C. Const. art. III, §§ 2, 3, 6. The General Assembly was last redistricted in the wake of the 1980 census.

The existing boundaries of the House districts were enacted into law by the General Assembly in 1981 and were precleared by the Justice Department under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1988) ("Act"), in time for the 1982 House election. The 1981 House redistricting plan has never been challenged under Section 2 of the Act, 42 U.S.C. § 1973 (1988), and re-

mained in effect through the most recent House election in 1990. App. 70.

In 1983 the General Assembly enacted a Senate redistricting plan, and the State of South Carolina filed a declaratory judgment action in the United States District Court for the District of Columbia seeking preclearance under Section 5. *South Carolina v. United States*, 589 F. Supp. 757 (D.D.C. 1984). When it became apparent that the District of Columbia court could not act in time for the 1984 Senate election, a three-judge district court in South Carolina formulated and imposed an interim redistricting plan. *Graham v. South Carolina*, Civ. No. 3:84-1430-15 (D.S.C. July 31, 1984), *appeal dismissed for lack of jurisdiction sub nom., NAACP v. Daniel*, 469 U.S. 1101 (1985). Subsequent to the court's order, the General Assembly adopted and the Governor signed into law a legislative redistricting plan for the Senate. This plan was then precleared by the Justice Department. Accordingly, the three-judge court vacated its interim plan and the legislative plan went into effect. *Id.*, Order filed August 13, 1984. In November 1984, an action was filed challenging the legislatively-enacted Senate plan under Section 2 on a state-wide basis; the plaintiffs consented, however, to dismissal of the complaint with prejudice. *NAACP v. South Carolina*, Civ. No. 3:84-2865-8 (D.S.C. May 29, 1986).[1] The 1984 Senate plan thus remained in effect through the most recent Senate election in 1988.[2]

---

[1] In addition, a Section 2 action was instituted challenging a special election in one of the black majority Senate districts established in the 1984 legislative plan. After a full bench trial, the district court ruled that Section 2 had not been violated, and the Fourth Circuit affirmed. *NAACP v. South Carolina Democratic Party*, Civ. No. 3:88-2492-2 (D.S.C. Feb. 29, 1989), *aff'd mem.*, 898 F.2d 146 (5th Cir. 1990).

[2] In March 1982, a three-judge district court drew interim Congressional districts in time for the 1982 election. *South Carolina State Conf. of Branches of NAACP v. Riley*, 533 F. Supp. 1178 (D.S.C. 1982). The General Assembly never passed its own plan and the court's plan remained in effect for subsequent congressional elections through 1990. App. 6.

At the time the 1984 Senate plan was put into effect, the majority of total population ("TOP") in ten of the 46 Senate districts was black, with those majorities ranging from 50.23% to 63.24% of total population. The majority of voting age population ("VAP") in seven of those Senate districts was black, ranging from 50.53% to 59.15%. Under the 1981 House plan, 26 of the 124 legislative districts had black majorities of total population (ranging from 50.12% to 73.64%), and 20 districts had black majorities of voting age population (ranging from 51.23% to 68.88%). App. 27-28 n.34.

C. *The Redistricting Process After The 1990 Census*

The 1990 census, issued in March 1991, reflected an increase in South Carolina's total population from 1980 to 1990, as well as a shifting of population within the state. App. 6. The total number of black South Carolinians increased, but the black percentage of total population decreased from 30.38% in 1980 to 29.82% in 1990. App. 65. The black percentage of voting age population also decreased, from 27.3% to 26.9%. SRAC Juris. St. at 5. The ten black majority Senate districts experienced a net loss in population due to these demographic changes. App. 65-66. The number of black majority TOP House districts decreased, for the same reasons, from its original 26 to 24, although the number of black majority VAP districts increased from 20 to 21. App. 71.[3] The district court found that these "demographic changes in South Carolina's majority black districts are wholly unrelated to the representation provided" or other racial issues. App. 66. Rather, "the changes are indicative of a general movement away from urban and rural areas to suburban and resort areas." *Id.*

The 1990 census also demonstrated that the House and Senate districts had become unconstitutionally mal-

---

[3] The term "black majority TOP district" refers to a district where the majority of the total population is black. The term "black majority VAP district" refers to a district where the majority of the voting age population is black.

apportioned. Using 1990 census data, the 1984 Senate plan was shown to have a total deviation from the ideal population of 63.15%, and the 1981 House plan a total deviation of 113.86%. The 1982 Congressional plan had a total deviation of 8.33%. App. 6 & n. 13. Accordingly, the General Assembly began an effort to pass redistricting legislation. It was unable to do so during the 1990-91 Legislative Session, which adjourned *sine die* on June 6, 1991. App. 7.

D. *Proceedings In The District Court*

On October 4, 1991, the Republican Party filed a complaint alleging deadlock in the South Carolina General Assembly and requesting the court to reapportion the South Carolina Senate, House, and Congressional districts. *Burton v. Sheheen*, Civ. No. 3:91-2983-1 (D.S.C.). On October 31, 1991, SRAC filed a similar complaint. *SRAC v. Campbell*, Civ. No. 3:91-3310-1 (D.S.C.).[4] A three-judge court was designated pursuant to 28 U.S.C. § 2284 (1988), and the cases were consolidated.[5]

Motions were filed, claiming that judicial intervention was not yet warranted because the General Assembly might yet successfully enact redistricting plans when the

---

[4] The defendants in these cases included the Governor, Lieutenant Governor (who is President of the Senate), the Speaker of the House, and the Executive Director of the Election Commission. The state Senate, the Democratic Party and various individuals (in private and governmental capacities) were subsequently permitted to intervene as parties or participate as *amicus curiae*.

[5] A third case, *Blanton v. Campbell*, Civ. No. 2:91-3635-1 (D.S.C.), primarily involved allegations that the South Carolina county delegation system of government violated the United States Constitution and the Voting Rights Act. That case was consolidated with the other two. *See* App. 9 & n.20. The issues not disposed of by the three-judge court were deconsolidated by the court in its May 1, 1992 order and assigned to a single district judge for resolution. Issues regarding the county delegation process are not involved in the instant appeals.

legislature reconvened in January 1992. App. 10. In fact, upon reconvening, the General Assembly did pass House and Senate redistricting plans. On January 29, 1992, however, the Governor vetoed both plans, and the vetoes were sustained. App. 10-11. The court then set the case for trial beginning February 18, 1992. App. 11.

At trial, the parties stipulated that population shifts as reflected by the 1990 census had resulted in unconstitutional malapportionment of the existing districts. All parties agreed that as a result of such malapportionment, those plans should not and could not be implemented for the upcoming elections. Instead, the parties presented their own proposed plans. Confronted with the complexity of the parties' computer-generated plans and the likelihood of being required to draw its own plans, the court appointed as technical advisor to the court the Director of the Division of Research and Statistical Services of the State Budget and Control Board.

The court received evidence in three phases relating, respectively, to the Senate, House, and Congressional plans. In order to expedite the proceeding, expert testimony received in one trial was allowed to be incorporated by reference in subsequent trials. During the first day of testimony, the court expressed concern over the relevance of the evidence being presented by SRAC and the Republican Party relating principally to the history of discriminatory voting practices in South Carolina. The court requested the parties to address the relevance of Section 2 to the issues in the case. Nonetheless, the court heard or admitted evidence on all the points on which plaintiffs wished to introduce evidence.

The facts on which the court based its conclusion were extensive and vigorously disputed by the parties in live testimony, including conflicting and hotly contested expert testimony. Although SRAC contends that "[t]he evidence of political cohesiveness and racial block voting was extensive, and was unrebutted," SRAC Juris. St. at 6, in fact, the testimony of plaintiffs' "experts" was

shown on cross examination to be highly selective and misleading. One of their statistical experts admitted, for example, that his analysis ended with elections in 1984 and that he was unaware of the many examples cited to him of black candidates' successes in elections after that year. Tr. at 10, 73-77 (testimony of James W. Loewen, Feb. 19, 1992). Moreover, his testimony regarding Senate districts was based largely on multi-member districts, since 1984 was the first year in which Senate elections made use of single-member districts. *Id.* at 58-59. Another of plaintiffs' statistician's data were shown to be misleading in the use of selective rounding of numbers to arrive at nonexistent and meaningless distinctions among the plans. Tr. at 46-47, 54-55 (testimony of Theodore S. Arrington, Feb. 21, 1992). He too admitted that his figures did not reflect the many examples of black electoral success that undermined his conclusions. *Id.* at 63-69. In fact, the evidence was replete with instances of black electoral successes, including successes in majority white districts, as well as instances of white electoral successes in majority black districts.[6] The court made clear from the bench that even if it treated Section 2 in the manner urged by SRAC and the Republican Party, the proof offered by their experts fell far short of meeting their burden.

E. *The District Court's Analysis*

The three-judge court concluded that none of the redistricting plans proposed by the parties "fully comports with the objectives and criteria which should be incorporated in a judicially approved plan." App. 12. The court thus drew its own plans "as an interim remedy." *Id.* In fashioning its plans, the court observed that redistricting is, "first and foremost, a state legislative responsibility rather than a federal judicial task." App. 13. The court thus recognized that it "possesses no distinctive mandate to com-

[6] A more detailed discussion of the evidence relating to black electoral successes and expert testimony, including examples of the inadequacies of appellants' expert witness' testimony, is contained in the Motion To Dismiss or Affirm filed in this case by the Democratic Party of South Carolina.

promise potentially conflicting state redistricting policies in the people's name," and that it must therefore try to achieve the goal of population equality with only *de minimis* variation. App. 20. For the same reason, the court ruled that "in fashioning interim relief where state political actors have failed to produce redistricting plans, this court . . . 'should follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution.'" App. 14 (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)).

In formulating its interim plans, the court gave principal consideration to the requirements and standards of the Voting Rights Act. The court noted that Section 5 and its preclearance requirement did not directly apply because the court was drawing its own plans. The court recognized, however, that it must consider whether its plans have a discriminatory or "retrogressive" effect, *i.e.*, whether the plans cause a diminution in minority voting opportunity from what it had been under the previous plans. App. 26. In making this determination, the court applied the case law and Justice Department regulations under Section 5. *See* App. 25-31, 39-42.[7]

The court also considered Section 2 of the Act. The court held that while it was not required to "completely graft the tests and requirements of § 2, including the searching evidentiary requirements," to its formulation of an interim plan, it nonetheless should adopt a plan that "comport[s] with the standards and guidelines of § 2," including those set out in *Thornburg v. Gingles*, 478 U.S.

---

[7] For example, the district court looked to the principles developed in *City of Lockhart v. United States*, 460 U.S. 125 (1983); *Upham v. Seamon*, 456 U.S. 37 (1982); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Wise v. Lipscomb*, 437 U.S. 535 (1978); *Beer v. United States*, 425 U.S. 130 (1976); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); various other Supreme Court and lower court cases; and the Justice Department preclearance regulations, 28 C.F.R. Part 51 (1991).

30 (1986), and its lower court progeny. App. 38. *See* App. 31-57. The court explained that,

> with the goal of providing minorities with an equal opportunity to elect the representatives of their choice in mind, we have analyzed the proposed plans as well as the plans we adopt today based on the following factors: 1) the extent to which the plans proposed and the plans adopted are consistent with the retrogression standard set forth in *Beer* and *City of Lockhart*; 2) the extent to which reasonable [sic] compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist; 5) the extent to which the lines which have been drawn limit the number of majority-black single-member districts in light of the expressed state policies of the State of South Carolina. . . . This approach allows the court to formulate a plan which is consistent not only with the provisions of § 5, but insures that the court's plan will not violate the threshold requirements for liability under § 2.

App. 46-47.

Finally, the court emphasized that "[u]nlike the parties," it "is not free to impose a particular political or racial agenda upon the state. The court must, as a court of equity, remedy the constitutional deficiencies of the current plan with due deference for state policies." App. 75 (footnote omitted). The court thus formulated a redistricting plan that it found

> achieves the proper balance between drawing districts of equal population, recognizing concentrations of black voters, and giving effect to current state policy respecting the redistricting process and avoiding the "political thicket" that arises in pitting large numbers of incumbents against one another.

Id.

F. *The District Court's Interim Plans*

1. *Senate.* The court's plan for Senate districts has a total population deviation of 1.95%, which the court

found to be *de minimis*. App. 61. Looking to the state policy of respecting county lines, the court's plan contains only 30 "excess" county-line cuts.[8] Similarly, the court's plan splits only 49 precinct lines, thereby minimizing voter confusion and administrative inconvenience. App. 63-64.

The court's plan demonstrably improves minority political opportunity in light of the intervening population shifts. Even though the black percentage of total population and voting age population had decreased in South Carolina during the previous decade, the interim plan *increases* the number of black majority TOP and VAP districts:

	Court Plan	1984 Plan / 1980 Census Data	1984 Plan / 1990 Census Data
Black Majority TOP Districts	11	10	10
Black Majority VAP Districts	10	7	9

Similarly, black population concentrations—in terms of black percentage of both TOP and VAP—increase in most of those districts. *See* App. 66-68.

The court rejected all the plans proposed by the parties, including the Governor, the Lieutenant Governor, SRAC, the Republican Party and the Senate. The court found, for example, that the plans proposed by the Governor and Republican Party, while having insignificantly lower population deviations than the court's plan, did not respect county lines (52 and 56 excess cuts versus 30 under the court's plan) or precinct lines (122 and 144 cuts versus 49 under the court's plan). App. 61-64. One Republican-proposed district, for example, stretched for 100 miles, cutting into seven counties, and included disparate urban and rural communities. App. 63-64. Thus, the court found that its plan achieved compactness and contiguity and protected the state's established communi-

[8] "Excess" county cuts are those which are not necessary to meet population equality requirements. *See* App. 62-63.

ties of interest better than the other proposed plans. App. 63.

2. *House.* The court's House redistricting plan has a total population deviation of 1.98%. App. 72. Again, the plan increases the number of black majority districts, despite the decrease in relative black population:

	Court Plan	1981 Plan/ 1980 Census Data	1981 Plan/ 1990 Census Data
Black Majority TOP Districts	28	26	24
Black Majority VAP Districts	23	20	21

The percentage black TOP and VAP majorities under the court's interim plan are higher in many districts than under the 1981 plan. App. 71. The court's plan honors state policy by limiting the number of excess county cuts to 20. App. 73.

Again, the court rejected all party-proposed plans. In particular, the court rejected SRAC's, the Republican Party's and the Governor's proposed House plans because, while those plans created a greater number of black majority districts, they did so by "throw[ing] all consideration of state policy of recognizing county lines to the wind," *id.*, and by flouting the requirements of compactness and contiguity. One SRAC-proposed district, for example, "[w]ith no apparent purpose other than capturing as many black persons . . . as possible . . . starts near the northwestern corner of [Horry] county and runs in a thin, snaking line back and forth across the county, ending at the southern end of the county." App. 78. One Republican-proposed district was composed of "fractions of three counties and three towns," with "no demonstrated cohesiveness." App. 77. The court found that appellants "seek[] the imprimatur of the court upon the elimination of house incumbents to suit the sponsoring party's political purpose, *i.e.*, the Republican Party and the Governor appear to seek to eliminate

Democrats and the SRAC appears to seek to eliminate incumbents because of their race." App. 74.

3. *Congress.* The court's interim plan for South Carolina's six Congressional districts has a total population deviation of zero, and splits only 13 counties. App. 81, 84. The plan also creates a black majority district, unlike the old 1982 plan. App. 82-83. The court's Congressional plan is not being challenged in the present appeals.

ARGUMENT

I. THE APPEALS SHOULD BE DISMISSED AS MOOT BECAUSE THE ELECTION WILL HAVE TAKEN PLACE BEFORE THIS COURT CAN REVIEW THE CASE

These appeals are from an interim order establishing legislative districts for the purpose of the 1992 elections and until the South Carolina legislature adopts approved redistricting plans. The primary election was conducted on August 25, 1992, using the district court's redistricting plans. The general election is scheduled for November 3, 1992. Significantly, the appellants have not sought to stay the election or to expedite these appeals. If the Court were to note probable jurisdiction, briefing and argument in the case would not be completed until well into 1993, and the case would not likely be decided until the Spring of 1993. Under such circumstances, where the requested relief would be moot when rendered, dismissal is appropriate.

1. The district court clearly intended its plans to function solely as interim measures, stating that "[i]t is our hope that the General Assembly and the Governor will work together and fashion acceptable plans. In the interim, these are the plans for the South Carolina Senate, House of Representatives and the United States Congressional Districts." App. 85-86. Because the disputed plans are designed only for two elections, one past and one to occur even before briefing in this case is complete, this Court should not expend its limited resources crafting a decision that may have no practical effect. This Court

in the past, when faced with the necessity of deciding appeals regarding an election after the disputed election has been conducted, has concluded that the issue is moot and dismissed the cases. *See, e.g., Harris v. City of Birmingham*, 112 S. Ct. 2896 (1992) (mem.), *vacating as moot, Greene County Racing Comm'n v. City of Birmingham*, 772 F. Supp. 1207 (1991); *Watkins v. Mabus*, 112 S. Ct. 412 (1991) (mem.) *aff'g in part, vacating as moot in part*, 771 F. Supp. 789 (S.D. Miss.); *Illinois State Bd. of Elections v. Socialist Workers*, 440 U.S. 173, 187-88 (1979).

This is not a case where it is "reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988). *See DeFunis v. Odegaard*, 416 U.S. 312, 318-19 (1974). If history is any guide, South Carolina may well enact legislative plans, which would be subject to challenge under Sections 2 and 5 of the Act. In 1984, for example, shortly after the district court imposed an interim redistricting plan for the Senate, the General Assembly enacted a plan for the Senate, which the Governor promptly signed and the Justice Department precleared. *See* p. 3, *supra*. If legislative plans are implemented, they will replace the district court's interim plans at issue in this case, and this Court's review of the interim plans will have been futile and of no practical consequence: an advisory opinion. Those legislative plans, of course, would be subject to challenge under Section 2—as, indeed, the 1984 legislative Senate plan was challenged (albeit unsuccessfully) under Section 2. *See* p. 3, *supra*.

Alternatively, if it becomes apparent as the 1994 House elections and 1996 Senate elections approach that the political process remains deadlocked, a timely challenge can then be brought to the district court's plans, which at that time will no longer be "interim." Such a challenge would have the benefit of concrete, district-by-district evidence derived from the 1992 election regarding racial polarization, political cohesiveness and other Section 2

factors. *See Gingles*, 478 U.S. at 59, 80 (analysis of vote dilution must be district specific). At the present time, by contrast, the evidence on these issues necessarily is abstract and speculative.

If the legislature enacts its own plans, or if any voting rights deficiency in the district court's plans emerges from the 1992 election, "there is no reason to suppose" that a future Section 2 challenge to redistricting in South Carolina "will not come with relative speed to this Court." *DeFunis*, 416 U.S. at 319.

2. In addition to the usual constitutional and prudential concerns that are raised by a claim of mootness, another factor should play an important role in the Court's decision. This Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539 (citing *Connor v. Finch*, 431 U.S. 407, 414-15 (1977)); *see also McDaniel*, 452 U.S. at 138; *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Although the district court found it necessary to impose court-ordered redistricting plans for the 1992 election, it noted that "this court was called upon to perform a task that all concede is most properly a legislative one." App. 85.

Therefore, the General Assembly, as newly constituted after the November election, and the Governor should be accorded the opportunity to draft constitutional redistricting plans, as they did in 1984 subsequent to the court's imposition of an interim plan. Certainly this Court, in the absence of a request from appellants for exigent relief, should avoid the "political thicket" of the redistricting process unless and until it must.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE APPEAL PRESENTS NO SUBSTANTIAL ISSUES

Apart from the procedural reasons to dismiss, it is apparent that plenary review is unwarranted on the facts presented, and that affirmance on the merits would be

appropriate. The district court's interim plans raise no significant issues of racial voting equity—the interest at the core of Voting Rights Act litigation. In fact, the district court's plans so clearly protect minority voting rights that this Court should endeavor to dispose of these appeals before November 3 so as to remove from the election any cloud of the claims of racial unfairness.

Under this Court's precedents, the district court's interim plans must be viewed against South Carolina's districting plans in effect immediately prior to the implementation of the court's plans. *City of Lockhart*, 460 U.S. at 132, 134; *see Beer*, 425 U.S. at 141-42; *Perkins v. Matthews*, 400 U.S. 379, 394 (1971); *see also* 28 C.F.R. § 51.54(b)(1) (1991). The three-judge court's plans in this case *increase* the voting strength of South Carolina's black population compared to the districting plans previously in effect—plans that were federally approved as consistent with the Voting Rights Act under the 1980 census figures.[9] Given that the number of blacks as a percentage of South Carolina's total and voting age population has declined since the previous plans were implemented, *see* p. 4, *supra*, it cannot credibly be argued that the court's interim plans violate the Act.

The Senate and House districting plans implemented after the 1980 census were found, at the time of implementation, to comply with the Constitution and the Voting Rights Act. The 1981 House plan and 1984 Senate plan both were precleared by the Department as consistent with Section 5. The Justice Department said, in approv-

[9] The effectiveness of the district court's interim plans in protecting minority electoral opportunities was confirmed in the June primary elections. Black candidates were elected in 18 House districts, and 15 of these candidates are running unopposed in the November elections. Black candidates were elected in 7 Senate districts, and 6 of these candidates are running unopposed. Office of the Clerk, South Carolina House of Representatives, *Blacks Offering for Election to the General Assembly* (1992-93). Presently, there are 14 blacks serving in the House and 6 serving in the Senate. Office of the Clerk, South Carolina House of Representatives, *Legislative Black Caucus* (Feb. 1, 1992).

ing the Senate plan, that the plan "will afford to black citizens a fair opportunity to participate in the political process and elect candidates of their choice to office." Letter from Department of Justice dated August 10, 1984 (attached to order of August 13, 1984 in *Graham*). This language, of course, tracks the requirements of Section 2. No successful Section 2 judicial challenges have been made to these state-wide plans in the decade they have been in effect. To the contrary: the only two Section 2 challenges to the Senate plan were decidedly unsuccessful, one having been abandoned by the plaintiffs and one having been rejected by the courts. *See* p. 3 & n.1, *supra*.

Against this background of districting plans that had been established as lawful under the 1980 census, the three-judge court created interim plans that enhanced minority voting opportunity despite the population shifts that reduced the minority proportion of the state's population. Yet, the district court's interim plans increase, as compared to the prior plans, both the number of majority-black TOP and VAP Senate and House districts, *see* pp. 10-11, *supra*, and the average minority concentration of the Senate districts.[10]

---

[10] The district court's Senate plan enhances black population concentrations in the black majority Senate districts. Based on comparison with 1980 census data, the proportion of blacks as a percentage of total population and as a percentage of voting age population increases under the district court's plan in *each* of the ten "original" black majority TOP districts, and the average TOP and VAP percentages increase from 56.41% to 59.45% TOP, and from 52.39% to 55.35% VAP. App. 68. Based on comparison with 1990 census data, the percentages of black total population increase in six of the ten "original" districts, and the overall average TOP and VAP percentages increase under the interim plan from 57.66% to 59.45% TOP, and from 53.76% to 55.35% VAP. App. 68. The increase in concentration, moreover, is not achieved at the cost of significantly reducing the size of black majorities in other districts. In three of the remaining districts, black TOP and VAP percentages decrease under the interim plan by concededly insignificant amounts (Districts 7, 39 and 40); in one district (District 42), black TOP decreases by 3.68% to 59.60% and black VAP decreases by 2.59% to 54.43%. App. 68. However, in each of these districts except District 40, the incumbent is black. App. 27 n.34.

A reapportionment plan that increases black voting strength as compared to an approved and lawful prior plan, particularly in light of declining proportions of total black population and voting age population within the state, cannot dilute or abridge the right to vote. As the Court observed in *Beer*, 425 U.S. at 141, "reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning" of Section 5. *See also City of Lockhart*, 460 U.S. at 135-36. The appellants' claims that the district court may have utilized standards or procedures that in certain subtle and technical ways allegedly are incorrect, therefore, essentially is academic. Such claims do not present a case deserving of plenary review.

Shorn of their spurious references to Voting Rights Act issues that may be presented in other cases but are not presented here (*see* pp. 22-23, *infra*), the essence of the appellants' complaint is that the district court should have adopted "better" plans, that is, plans that advanced one or another of the particular policies favored by the appellants, whose redistricting plans were not adopted by the court. This complaint is misdirected. As noted above, *see* p. 14, *supra*, redistricting is first and foremost a legislative task, which the courts should "make every effort not to pre-empt." *Wise*, 437 U.S. at 539. The court may not make decisions concerning "basic political policy," as these are the responsibility of the state legislature. *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985). The court below properly refused to be drawn into the role of a three-member super legislature.

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT APPLIED WELL-ESTABLISHED LEGAL CRITERIA AND DID NOT ABUSE ITS DISCRETION IN FORMULATING INTERIM REDISTRICTING PLANS

When a state legislature fails to establish a constitutional redistricting plan, a district court may, within

broad constitutional limits, formulate its own interim plan, as the court below did. *See Wise*, 437 U.S. at 540; *Connor*, 431 U.S. at 415; *White v. Weiser*, 412 U.S. at 794-95; *Ely v. Klahr*, 403 U.S. 108, 114-15 (1971). In reviewing such a plan, "[t]he essential question . . . is whether the District Court properly exercised its equitable discretion in reconciling the requirements of the Constitution with the goals of state political policy." *Connor*, 431 U.S. at 414. The exercise of that discretion is reversible only if it is abused. *See, e.g., East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976); *Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944). Far from abusing its discretion, the court below painstakingly laid out the governing principles and carefully and thoughtfully applied them to the facts before it.

A. The District Court's Interim Redistricting Plans Are Consistent With Well-Established Legal Criteria

As this Court noted 15 years ago, "'[i]t can hardly be said that this Court has given no guidance of general applicability to a court confronted with the need to devise a legislative reapportionment plan when the state legislature has failed.'" *Connor*, 431 U.S. at 414; *see Seamon*, 456 U.S. at 41 (quoting *White v. Weiser*, 412 U.S. at 794-95). These principles are even better delineated today. In exercising its discretion to fashion a court-ordered redistricting plan, the district court should seek to devise a plan that minimizes deviation from the one person, one vote ideal. *Chapman v. Meier*, 420 U.S. at 26-27. The district court also should strive for racial fairness: the court-ordered plan must not be racially discriminatory in purpose or effect, *McDaniel*, 452 U.S. at 148, and it may not be retrogressive or dilutive in its effect on minority voting rights. *City of Lockhart*, 460 U.S. at 134; *Beer* 425 U.S. at 141. Equally important, in light of the federalism concerns inherent in court-ordered redistricting, a court-ordered plan must "follow the policies and preferences of the State . . . whenever adherence to state policy does not detract from the requirements of the Federal Constitution" and the Voting

Rights Act. *White v. Weiser*, 412 U.S. at 795; *see Seamon*, 456 U.S. at 41-43; *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1970).

In rejecting the plans proposed by the parties and in fashioning its own interim plans, the district court properly applied these relevant legal principles. The court below declined to adopt party-proposed plans that it found were politically or racially motivated, and instead implemented plans that meet the constitutional objective of population equality, comply with the standards of the Voting Rights Act, and respect the policies of South Carolina to the extent not inconsistent with these other goals.

1. The district court crafted plans that are valid under the Equal Protection Clause since they provide for only *de minimis* population variance between districts. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The appellants do not argue otherwise.[11]

2. The district court's plans also properly assure racial fairness. In formulating a redistricting plan, a district court is required to "follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *McDaniel*, 452 U.S. at 149 (quoting S. Rep. No. 94-295, 94th Cong., 1st Sess. 19 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785). The court below did exactly as the law requires.[12]

[11] The district court's plan for the South Carolina Senate results in a total deviation range of 1.95 percent (App. 61); for the House, a range of 1.98 percent (App. 72); and for the Congress, a range of 0.0 percent (App. 81).

[12] In an effort to distract this Court, appellants wrench out of context the district court's references to the action before it as "Section 5 proceedings." SRAC Juris St. at 9; Gov. Juris. St. at 6. *See* App. 38. Appellants protest that this case was not brought under Section 5, and thus argue that the court below misunderstood what it was doing. This argument is a red herring. From the context of the district court's lengthy opinion, it is clear that the court understood and meant simply that it was applying Section 5 *standards*, as the law requires, not that the case was a formal Sec-

The essence of a Section 5 inquiry is a determination whether implementation of voting-procedure changes "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. The district court's interim plans do not simply avoid retrogression, but actually improve the opportunity for black citizens to elect representatives of their choice in both houses of the General Assembly. *See* p. 16, *supra*. A plan that enhances minority opportunity with respect to the effective exercise of the electoral franchise, as the district court's plans do, is not retrogressive within the meaning of Section 5. *Beer*, 425 U.S. at 141; *see also City of Lockhart*, 460 U.S. at 134 & n.10.

3. The district court recognized that it was required to follow the "policies and preferences" of the state, as expressed in the South Carolina Constitution and statutes and in the plans proposed by the state legislature, to the extent these were not inconsistent with other federal constitutional and statutory obligations. App. 14; *see Seamon*, 456 U.S. at 43; *White v. Weiser*, 412 U.S. at 795. The court found that South Carolina's strongest electoral policy is that of "maintaining the integrity of county boundaries in the redistricting process." App. 15-16. In addition, the court considered other legitimate state policies, including maintaining other "political subdivision lines, compactness, contiguity, recognition of historical boundaries, and protection of constituent representative relations." App. 62. *See also Connor*, 431 U.S. at 419; *Chapman v. Meier*, 420 U.S. at 22-23; *Karcher v. Daggett*, 462 U.S. at 740; *Swann v. Adams*, 385 U.S. 440, 444 (1967). As our description above of the district court opinion makes clear, the district court took all these factors into account. *See* pp. 7-12, *supra*.

The appellants take issue with the district court for giving too much deference to state policies. As shown

---

tion 5 challenge to a plan that has not been pre-cleared. *See* App. 25. As discussed in the text, the court also applied Section 2 standards.

above, however, the court properly applied the principles of the Constitution and Voting Rights Act, including the critical principle that the court-ordered plans *must* adhere as closely as possible to the policies of the state. The court found that, unlike its own plans, the plans proposed by the appellants failed to "strike[] the proper balance between the various interests arising in this type of proceeding, including equality of population in districts, racial fairness, and maintenance of . . . South Carolina's political subdivisions and communities of interest." App. 69-70.

To maintain county boundaries, political subdivisions and geographical compactness and contiguity, the district court's Senate and House plans have far fewer excess county-line and precinct-line cuts than the plans proposed by SRAC, the Governor or the Republican Party. *See* App. 63-64; pp. 10-11, *supra*.[13] The district court found that its Senate plan allowed for more compact and contiguous districts than the appellants' plans, which the court considered overly violative of the state's political boundaries. App. 63. Similarly, the House plans proposed by the appellants "throw[] all consideration of the state policy of recognizing county lines to the wind." App. 73.

[13] The Governor's and Republican Party's Senate plans, for example, made 52 and 56 excess county-line cuts, respectively, while the court's made only 30; the Governor's Senate plan split 122 precinct lines and the Republican Party's split 144, while the court's plan splits only 49. App. 63-64. Similarly, the district court's House plan contains only 20 excess cuts in county lines, whereas the Governor's House plan made 38 and SRAC's House plan made 48 excess cuts in county lines. App. 73-74. Further, under the court's plan, only 29 House districts lie in 2 counties, 7 lie in 3 counties, and 2 lie in 4 counties. App. 73. The Governor's plan had 33 districts lying in 2 counties, 12 lying in 3 counties, 1 lying in 4 counties, and 1 lying in 5 counties. App. 74. Worse yet, SRAC's plan called for 34 districts to lie in 2 counties, 9 to lie in 3 counties, 6 to lie in 4 counties, and 3 to lie in 5 counties. App. 74. Appellants try to minimize before this court the importance of these factors, but one of SRAC's own expert witnesses testified below to the problem of disenfranchisement of voters caused by fragmentation, especially among blacks. Tr. at 30-32 (testimony of Theodore S. Arrington, Feb. 21, 1992).

The court found that the Governor's plan called for "splintering and splicing" of towns and counties, App. 78, and SRAC's plan split communities of interest to draw lines based solely on skin color. App. 78-79. The district court concluded that the appellants' plans fail "to suggest even a casual observance of South Carolina's traditional and legitimate policies." App. 65. Clearly, the district court's plans—which properly recognize that fragmentation of districts undermines the ability of constituencies to organize and increases voter confusion, App. 16 n.29—most adequately respected the policies of the state.[14]

Not surprisingly, there is an explanation for the line-drawing performed by the appellants: politics. The Republican Governor's Senate plan, for example, pitted ten incumbent Democratic senators against one another. App. 65 n.61. Regarding the proposed House plans, the district court observed that "the Republican Party and the Governor appear to seek to eliminate Democrats and the SRAC appears to seek to eliminate incumbents because of their race." App. 74. Promotion of such political or racial agendas are not properly advocated by the courts. Courts fashioning redistricting plans must act " 'circumspectly, and in a manner "free from any taint of arbitrariness or discrimination." ' " App. 14 (quoting *Connor*, 431 U.S. at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964))). The district court was not free to impose its own political agenda, but was required to adhere to the guidelines laid down by this Court, which, as explained above, it carefully and reasonably did.

B. The District Court Properly Applied Section 2 In Fashioning Its Interim Plans

Appellants' principal objection to the district court's plans raises an issue not presented on this record: whether and to what extent a court-ordered interim plan must comply in all respects with Section 2. Appellants assert

[14] Further, the district court found SRAC's Senate plan, with a population deviation of 2.74%, to be "pushing the outer limits of the *de minimis* standard." App. 61 n.58.

that the court below, in fashioning interim plans, was required, but declined, to apply Section 2 as it has been interpreted by this and other courts in challenges to specific, existing election plans and practices. As we show below, even assuming that Section 2 applies to a court-ordered interim plan, the district court properly analyzed its plans under Section 2. It is thus not necessary to reach the question posed by appellants.

1. According to SRAC, the district court "did not undertake a meaningful analysis of minority vote dilution under Section 2 and *Thornburg v. Gingles*, . . . [but] [i]nstead, it applied the Section 5 retrogression standard of *Beer v. United States*." SRAC Juris. St. at 18. Similarly, the Governor complains that "the court below applied a 'retrogression' standard which purported to satisfy Section 2 of the Voting Rights Act." Gov. Juris. St. at 5. These assertions are simply wrong.

The district court's Order shows that, when considering the proposed plans and developing its own redistricting plans, the court carefully reviewed and applied Section 2, paying particular attention to this Court's decision in *Gingles*. Starting with the text of Section 2, the court noted that "Congress amended § 2 in 1982 to include a 'results,' or 'effects,' test to determine if racial vote dilution has occurred." App. 33. The district court observed this Court's admonition in *Gingles* that " '[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.' " *Id.* (quoting *Gingles*, 478 U.S. at 47). Following *Gingles*, the district court considered the " 'typical' factors which may be relevant to, and probative of, a § 2 claim," known as the " 'Senate factors,' " App. 34 (quoting *Gingles*, 478 U.S. at 36-37). Having laid out the factors and principles underlying a Section 2 analysis as described in *Gingles*, App. 31-38, the district court then devoted approximately 20 pages to discussing how those factors and principles would be applied to provide

an appropriate remedy in this case, involving as it does single-member districts, App. at 38-57, and then another 27 pages applying those principles, App. 58-85. Unquestionably, the court tested its plans under the requirements of Section 2. *See* pp. 8-9, *supra*.

2. The appellants attempt to make much of the district court's statement that it would not "completely [incorporate] the tests and requirements of § 2" into this case. App. 38. The Governor complains, for example, that

> [t]he court below never articulated which "tests and requirements" it refused to apply. . . . Presumably, the court below was referring to the three-pronged *Gingles* test (a minority group must be sufficiently numerically large and geographically compact to constitute a single member district, be politically cohesive, and be otherwise unable to nominate and elect its preferred candidates due to white racial bloc voting) and the seven ["Senate factors"].

Gov. Juris. St. at 12 n.9. But the district court explicitly stated that it considered, *inter alia*:

> . . . 2) the extent to which reasonable [sic] compact and contiguous majority black districts were and could be drawn; 3) the extent to which the minority group is politically cohesive; 4) the extent to which racially polarized voting patterns exist . . . [and to the extent relevant the seven] Senate factors.

App. 46. Indeed, in his statement, the Governor appears to concede that the district court analyzed these factors. Gov. Juris. St. at 6. Thus, the district court did precisely what the Governor, in claiming that a proper Section 2 analysis had not been conducted, presumed the district court had not done.[15]

---

[15] Appellants claim that the incorporation into Section 5 of Section 2, including all its procedural and evidentiary requirements, was effected by footnote 31 to the Senate Report, which states that "[i]n light of the amendments to § 2, it is intended that a § 5 objection follow if a new voting procedure itself so discriminates as to violate section 2." If anything, the footnote merely states that a violation of Section 2 establishes a violation of Section 5. Further, as the district court held, App. 45, it is highly doubtful

Furthermore, a reading of the district court's Order makes clear that the Section 2 "tests and requirements" the court declined to adopt were not the *substantive* standards of the statute, but rather all the procedural and evidentiary requirements set forth in *Gingles*, which was a challenge to an *existing* multi-member plan. The court below simply recognized that not all of those requirements could be applied wholesale to single member districts or to a case where the court was being asked to apply Section 2 in fashioning its own interim plans within a limited time prior to election.

The district court recognized, for example, that rules developed in challenges to specific, implemented plans may not work where the court is fashioning a new plan. The court noted that "in the context of this case, in which no less than five plans have been submitted for each political body, the burden of proof becomes more complex, especially if the whole of the results test is injected into the proceeding." App. 41. It can hardly have been an abuse of discretion, therefore, for the district court not to have adopted the precise rules governing burden of proof set out in *Gingles*.[16]

Similarly, no abuse of discretion is evident in the district court's judgment that time did not permit as "searching" a factual analysis as some courts engage in when addressing a Section 2 challenge to an existing plan or election practice.[17] The district court explained that the

---

that Congress intended to amend Section 5 through a footnote to a report on Section 2. Similarly, the Justice Department regulation on which appellants rely—28 C.F.R. § 51.55(b)(2) (1991)—simply calls for Section 5 analyses of plans to consider the substantive standards of Section 2, as the court below did.

[16] As the legislative history of the 1982 amendment makes clear, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. No. 97-417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 207.

[17] The district court also expressed concern about making a "blanket rule" that in cases of this type all the requirements of a

"filing dates and primaries ha[d] already been postponed once," and that imposing a full Section 2 evidentiary burden as to "each proposed plan in this case would have been staggering and would likely still be ongoing." App. 44. If courts faced with the exigent circumstances of impending elections were required to engage in protracted proceedings and make lengthy factual findings, their ability to rule expeditiously would be undermined. The appellants' rigid view of Section 2 evidentiary requirements is not consistent with the flexibility normally accorded a court when fashioning equitable relief in exigent circumstances. *See, e.g., Seamon*, 456 U.S. at 44.

Appellants were not prejudiced by the procedure they now attack. During the three-week trial, the district court allowed ample opportunity for submission of evidence that might assist in its Section 2 analysis. The district court admitted *all* the documentary evidence submitted by the parties, and permitted SRAC's and the Governor's witnesses to testify regarding the history of discrimination in South Carolina and any other Section 2 factor they wished to address. Indeed, in its jurisdictional statement, SRAC notes that the "SRAC and *Burton* plaintiffs submitted substantial evidence of the factors deemed probative of minority vote dilution identified in *Thornburg v. Gingles* . . . and the ['Senate factors']." SRAC Juris. St. at 5. SRAC goes on to discuss the evidence submitted relevant to the "Senate factors," including expert witness testimony, statistical analyses, and other documentary evidence. *Id.* at 5-8. It is hard to imagine, and the appellants fail to make clear, what the district court could have done to make its analysis more "meaningful." [18]

---

formal Section 2 inquiry apply, for fear that after its implementation, the plan would then be protected from a subsequent Section 2 challenge by the principles of *res judicata*. App. 42.

[18] Indeed, in a recently filed petition for a writ of certiorari seeking review of a court-ordered plan, the petitioners cited the South Carolina district court's handling of this issue as exemplary. *See* Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, at 12-13, *Loeper v. Mitchell*, No. 91-2015 (filed June 8, 1992).

3. Stripped of its rhetorical baggage, the essence of appellants' claim is that Section 2 required the district court to create a greater number of black majority districts and to gerrymander those districts such that they contain black super majorities of at least 57% TOP. SRAC Juris. St. at 20, 25-26; Gov. Juris. St. at 19-20. No constitutional or statutory basis exists for either contention, as the district court correctly held. In exercising its discretion, the court was not bound by rigid requirements regarding numbers and percentages. It was, rather, required to act reasonably to formulate districts that were non-discriminatory, non-retrogressive and non-dilutive, and that honored state policies.

There is no constitutional or statutory requirement to maximize the number of majority-black districts. Certainly Section 5 imposes no such requirement.[19] Neither does Section 2. In enacting the 1982 amendment to the Voting Rights Act, Congress sought to change the result of this Court's holding in *Mobile v. Bolden*, 446 U.S. 55 (1980), that Section 2 required a showing of discriminatory intent. The 1982 amendments were intended simply to "'restore the pre-*Mobile* [*v. Bolden*] legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote,'" principally the standards set forth in *White v. Regester*, 412 U.S. 755 (1973), and its progeny. *Chisom v. Roemer*, 111 S. Ct. 2354, 2363 n.21 (1991) (quoting S. Rep. No. 97-

---

[19] *See City of Lockhart*, 460 U.S. at 134; *Beer*, 425 U.S. at 140-41; *Perkins*, 400 U.S. 379; *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd mem. sub nom., Richards v. Terrazas*, 112 S. Ct. 3019 (1992); *Turner v. Arkansas*, 784 F. Supp. 553, 573 (E.D. Ark. 1991) (the Voting Rights Act "is not violated by a state legislature simply because that legislature does not enact a districting plan that maximizes black political power or influence"), *aff'd mem.*, 112 S. Ct. 2296 (1992); *Watkins v. Mabus*, 771 F. Supp. at 805; *Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979) ("No state or political subdivision is required to search for ways to maximize the number of black voting age population districts."), *aff'd mem.*, 444 U.S. 1050 (1980).

417 at 27). "Cases decided prior to the 1982 amendment to the Voting Rights Act uniformly hold that states are not required to seek out ways to maximize the number of black majority districts." *Watkins v. Mabus*, 771 F. Supp. at 806; *see Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.), *aff'd mem. sub nom., Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984). As the court below explained, appellants' approach serves as a

> "racial ratchet," which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of all other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute.

App. 30-31.

This is not to say that redistricting plans that have as a goal the maximization of black-majority districts cannot be implemented. In this case, the legislature remains free to enact a plan that, consistent with legal requirements, advances any legitimate political policy, including, perhaps, the creation of a greater number of "safe" minority districts. The district court, however, was not required—or even permitted—to make such a policy choice.

Appellants also are wrong in contending that the district court's plans are invalid because all black majority districts do not contain at least 57% black TOP. This Court's decisions do not require the creation of super-majority districts. In fact, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 162 (1977), a plurality of this Court specifically declined to set such an arbitrary number against which to test a plan's validity. The decision below is fully consistent with the cases decided pre-*Bolden*.[20]

---

[20] Both federal and state courts have approved plans characterizing as minority-opportunity districts those districts containing black majorities of slightly over 50%. In *Jordan v. Winter*, for example, this Court affirmed a district court judgment devising an interim

Appellants lose sight of the fact that under the district court's plans, blacks in most black majority districts have significantly more than a "bare" majority. In the Senate plan, for example, seven of the eleven black majority TOP districts have black majorities ranging from 58.91% to 68.51%, and all but one district have majorities of over 54%. App. 68. The remaining district, which also had a black majority of less than 54% under the 1984 plan, has a black incumbent Senator who has been re-elected. The district court's finding that these percentages will provide effective representation given the facts of this case is not clearly erroneous or an abuse of discretion. If the 1992 elections reveal that in certain districts blacks are unable effectively to participate in the electoral process and elect

---

plan that created a Congressional district with a 52.83% black VAP and rejected an alternative plan containing a 60% majority. The district court concluded that "52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting" and would "afford black citizens an equal opportunity to participate in the political process." 604 F. Supp. at 814. As Justice Stevens noted in his concurrence to the summary affirmance, the 52.83% district provided a "remedy that established at least one district in which black persons represented an *effective majority* of the eligible voters." 469 U.S. at 1005, n.4 (emphasis added). *See also Ewing v. Monroe County*, 740 F. Supp. 417, 426 (N.D. Miss. 1990) ("a range of 51-55% black voting age population is sufficient to enable blacks to elect candidates of their choice"); *James v. City of Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985) (plurality black VAP sufficient under Section 2); *Mellow v. Mitchell*, No. J-57-1992, at 9, 11 (Pa. Mar. 26, 1992) ("no legal requirement . . . that a district have a 65% African-American total population to satisfy Section 2"; finding that 52.4% black TOP "would henceforth give African-Americans the opportunity to elect candidates of their choice"), *petition for cert. filed*, 60 U.S.L.W. 3881 (June 8, 1992) (No. 91-2015). To be sure, certain district courts have found that the facts before them called for the creation of super-majority districts. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413-15 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Emison v. Growe*, 782 F. Supp. 427, 440-41 (D. Minn.), *prob. juris. noted*, 112 S. Ct. 1557 (1992); *Neal v. Coleburn*, 689 F. Supp. 1426, 1437-38 (E.D. Va. 1988). These cases, however, simply used super-majority percentages as "flexible and practical guidelines," *Neal*, 689 F. Supp. at 1438, to be considered in the "particular circumstances" of the facts of the cases. *Ketchum*, 740 F.2d at 1413.

representatives of their choice, and a Section 2 challenge is made, the court then can consider whether in particular districts and under a particular set of facts a supermajority is the required remedy.

CONCLUSION

This Court should dismiss the appeals as moot or summarily affirm the judgment below.

Respectfully submitted,

JOHN C. MOYLAN, III
(Counsel of Record)
OFFICE OF THE LIEUTENANT GOVERNOR
P.O. Box 142
Columbia, SC 29202
(803) 734-2080

TERRELL L. GLENN
BLANEY A. COSKREY, III
GLENN, IRVIN, MURPHY GRAY & STEPP
1510 Calhoun Street
P.O. Box 1550
Columbia, SC 29202
(803) 765-1100

WILLIAM R. STEIN
MARK H. DUESENBERG
HUGHES HUBBARD & REED
1300 I Street, N.W.
Suite 900 West
Washington, D.C. 20005
(202) 408-3600
Attorneys for Lieutenant Governor Nick Theodore

October 1992